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**TO THE SENATE REFORMS, RESTRUCTURING AND REINVENTING COMMITTEE**

**REGARDING SUBSTITUTE HB 5002**

I am writing to oppose HB 5002 in its current form. It has several provisions that are radical change from existing law and passage in its current form will result significant hardships to legitimate workers' compensation claimants and their families. The change in the definition of disability would also result in a significant shift of costs from workers' compensation insurance carriers and self-insurers to the State of Michigan welfare budget.

The proposed bill changes section 301 to allow employers to deduct the employee's theoretical wage earning capacity from the wage loss owed to partially disabled workers. In order to understand the significance of this change, let me first briefly explain the history of the definition of disability in the Workers' Disability Compensation Act.

**A brief history of the definition of disability**

From 1912 to 1982, there was no statutory definition of disability. In 1982, the Legislature enacted Section 301(4), which provided :

...'disability' means a limitation of an employee's wage earning capacity in the *employee's general field of employment* resulting from a personal injury or work-related disease.

The courts deemed this definition as no change from the prior Act, which defined disability as an inability to do ANY of the employee's prior jobs. Dissatisfaction with interpretation of this definition led the Legislature to amend the definition of disability in 1987:

'disability' means a limitation of an employee's wage earning capacity in *work suitable to his or her qualifications and training* resulting from a personal injury or work related disease.

Judicial interpretation of this 1987 language continues to evolve 24 years later. In 2002, the Supreme Court decided *Sington v Chrysler Corp.*, 467 Mich 144 (2002). In that case, the Supreme Court held that in order to prove disability, the injured worker had to prove that he or she "is no longer able to perform any of the jobs that pay the maximum wages, given the employee's training and qualifications. (*Ibid.,* at 467 Mich 157) Despite the lack of any language in the statute talking about

"maximum wages," the Supreme Court required the injured worker to prove that he/she was unable to work in any jobs which allowed the worker to earn his/her "maximum wages." If the worker proved that the disability prevented the worker from earning "maximum wages" at his/her current job or any prior jobs, then the worker received wage loss benefits, approximately 80% of their average after-tax weekly wage at the time of the injury.

Six years later, the Supreme Court further increased the burden of proof on injured workers when it decided *Stokes v DaimlerChrysler Corp.*, 481 Mich 266 (2008). In *Stokes,* the Supreme Court added additional elements of proof that have resulted in a new requirement of discovery of work histories and both sides having to hire vocational experts to determine the 4 elements of disability announced in *Stokes:*

"(1) The claimant must disclose all of his qualifications and training;

(2) the claimant must consider other jobs that pay his maximum pre-injury wage to which the claimant's qualifications and training translate;

(3) the claimant must show that the work-related injury prevents him from performing any of the jobs identified as within his qualifications and training; and

(4) if the claimant is capable of performing some or all of those jobs, the claimant must show that he cannot obtain any of those jobs.

If the claimant establishes all these factors, then he has made a prima facie showing of disability satisfying *MCL 418.301(4)*, and the burden of producing competing evidence then shifts to the employer. The employer is entitled to discovery before the hearing to enable the employer to meet this production burden."

*Stokes*, at 481 Mich 297-8.

It should be noted that the bill seeks to statutorily enshrine the Stokes case holding into the statute. As a result of Stokes, in every wage loss case both sides must now hire vocational experts to meet or dispute the vocational proofs now required. This has resulted in doubling the costs of experts for both sides in litigated cases and a greatly expanded burden in fact-finding by magistrates. In the old days, litigants only had to provide expert medical testimony. Now both sides need expert vocational testimony. Therefore, as a matter of policy and practice, incorporating the *Stokes* holding into the statute is a bad idea.

**Comparison of Stokes to HB 5002**

But HB 5002 does not simply codify *Stokes,* it goes further by changing how wage loss benefits are calculated by deducting the theoretical residual wage earning capacity from the wage loss rate for partially disabled claimants. Section 301(8) provides, in part, the method of paying wage loss as:

...THE EMPLOYER SHALL PAY OR CAUSE TO BE PAID TO THE INJURED EMPLOYEE AS PROVIDED IN THIS SECTION WEEKLY COMPENSATION EQUAL TO **80% OF THE DIFFERENCE BETWEEN THE INJURED EMPLOYEE'S AFTER-TAX AVERAGE WEEKLY WAGE BEFORE THE PERSONAL INJURY AND THE EMPLOYEE'S WAGE EARNING CAPACITY AFTER THE PERSONAL INJURY**, ...

Under current law, a disabled worker collects 80% of their average after-tax pay, even if the worker retains the capacity to earn other lower earning jobs. Under current law, the employer is then entitled to place the employee in a vocational rehabilitation program, where the employee looks for work. If the employee is successful in finding a job, then the employer only has to pay 80% of the difference between the pre-injury average weekly wage and the post-injury weekly wage.
The current bill allows employers to skip entirely the process of vocational rehabilitation, and simply allows employers to deduct the person's theoretical residual wage earning capacity from the after-tax average weekly wage. The cruelty of this provision is evident upon considering a simple example: **Take an employee who is earning $12.00/hour, or $480/week before taxes**. That's a modest income of about $25,000/year. If she's single with no dependents, **the current wage loss rate table gives her a wage loss rate of $301.54**. That's how much she'd get under our current system.

The current bill before you dramatically changes this calculation. The current wage loss rate tables represent 80% of the employee's after-tax pay, so to convert her rate to the "after-tax average weekly wage" required by new Section 301(8), we must increase the wage loss rate of $301.54 by 20% to $376.93. If the employer determines that she's still capable of working an easy sit-down job as a security monitor, then she would have a theoretical wage earning capacity of at least $320/week, assuming $8.00/hr times 40 hours. Since sit-down security guard jobs are unskilled and physically easy to perform, almost every injured worker would have the theoretical wage earning capacity to perform the job, whether or not they had every performed it. So in our example, $376.93-320.00= $56.93 X .80= $45.44. **So the injured worker, instead of getting $301.54/week, gets $45.44/week in wage loss benefits.**

We've heard testimony from the Chamber of Commerce in the House, soft-pedaling this provision by saying something like: "Oh, we'll only use that provision on the people who really should be working." That is misleading and untrue. If this is the law, every employer will have to apply this provision in determining wage loss rates in every case. And the provision is not only cruel to injured workers, who will be unlikely to go out and find these jobs in the current economy, but will cause havoc in the handling of even routine claims, as every case will require a vocational analysis in order to determine a wage loss rate.

Under the current system, paying the full 80% wage loss to partially disabled employees creates incentives for employers to return the person to their former employment. However, if the employer does not have to pay the full wage loss, any financial incentive to bring the employee back to work is lost. If our example of an injured worker above is unable to find a job to pay her residual wage earning capacity, she will end up on welfare or homeless. Given our state's high unemployment rate, it is unrealistic to think that injured workers will be able to quickly go out and find a new job. Furthermore, by requiring partially disabled workers to look for work in order to be eligible for wage loss, the worker is not being given any time to simply heal from her injuries. Under this bill, an injured worker with a residual earning capacity must immediately look for other work even while treating with doctors for her injuries, and there is no requirement that the employer has to take her back.

This represents a huge change in the workers' compensation system. For 100 years, employers had the power to reduce or eliminate their obligation to pay wage loss benefits by offering the injured employee work within their medical restrictions. HB 5002 destroys any incentive for employers to bring injured employees back to work because their wage loss obligation will be negligible and they can hope that someone else hires the injured worker. If enacted, HB 5002 will be a huge cost shift from employers and their insurance carriers to the tax-paying public. Michigan's welfare system does not need any more strain on the limited resources available in the state's budget.

**Increasing the employer's control of medical provider from 10 to 45 days**

Under current law, an injured worker is obligated to treat with the medical provider determined by the employer for the first 10 days after the injury. Section 315 of the bill increases that number from 10 days to 45 days. The increase in employer control of the medical provider is unwise and unconscionable. Americans do not appreciate their government, their insurance company, or their employer telling them who their doctor must be. Medical treatment, especially surgery, is viewed as a very personal choice that the patient should be allowed to exercise. Given that any doctor in Michigan is limited to the charges allowed under the Agency's medical cost containment rules, the worker is free to obtain the best possible doctor or surgeon to treat the work-related injury, at no extra cost to the employer. The proposed change to Section 315 is unwise public policy and should be rejected.

**Eliminating the Qualifications Committee for magistrates**

Prior to 1987, state administrative law judges who were protected by civil service decided contested workers' compensation cases. In 1987 the law was changed and workers' compensation magistrates were to be selected for 4-year terms by the governor. The

creation of the Qualifications Committee (known colloquially as "quack") was a protection enacted to ensure that only qualified members who either passed a written test, demonstrating knowledge and understanding of the law and medicine involved, or had practiced in the field for 5 years. The current bill seeks to eliminate those protections, substituting a requirement that the magistrate be a lawyer in good standing for 5 years. This would create a situation where unqualified persons could be appointed to a highly technical field, without any experience or knowledge. Our citizens have the right to expect that the judges who decide their case has the expertise to competently decide the case. The elimination of the Qualifications Committee is an important protection for the litigants that should be rejected.

**Forcing workers to retire early**

Section 354(d) currently to allow an employer to only deduct pension payments that an employee is actually receiving. HB 5002 amends that section by allowing an employer to deduct the after-tax amount of pension payments "... received by the employee, **or which the employee is eligible to receive at normal retirement age**, ... The bill does not define "normal retirement age." Many autoworkers, police, and fire fighters may receive their full pensions after 25 or 30 years of service. Needless to say, many of these workers choose to continue working well beyond the minimum number of years of service. Some, who started working in these professions after high school, may be in their late 40's or early 50's. Under this bill, since these workers could be considered "normal retirement age" because they had sufficient years of service, would have the unpleasant choice of choosing financial ruin or being forced to retire and take their pensions earlier than they wish. This provision also has the effect of discriminating against older workers, who would be forced to leave their jobs earlier than they planned.

**There is no economic justification for these proposed changes**

Insurance rates for workers' compensation insurance are dropping. There is no economic justification for the draconian aspects of this bill. The effects of this substitute bill will cause injured workers without sufficient wage loss benefits to lose their homes, their apartments, and increase caseloads in the welfare system. The negative effect on our state's economy, when injured workers don't have money to pay their rent, support their children, and even put food on their table, would be catastrophic. In the interests of fairness to injured workers, and in the interests of protecting our state welfare system from further expansion, I urge you to make appropriate changes in the substitute bill.

If the Committee is inclined to consider changing the bill, the proposals offered by the State Bar of Michigan Workers' Compensation Section are balanced, well thought out proposals by both sides of workers' compensation practitioners in the state. I urge you to seriously consider them.

Respectfully submitted,

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Attorney at Law